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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-698

No. 750

ELISE N. MILBURN, WIFE OF WILLIAM PALMER BILES,
Petitioner,

versus

PROCTOR TRUST COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN W. HARRELL,
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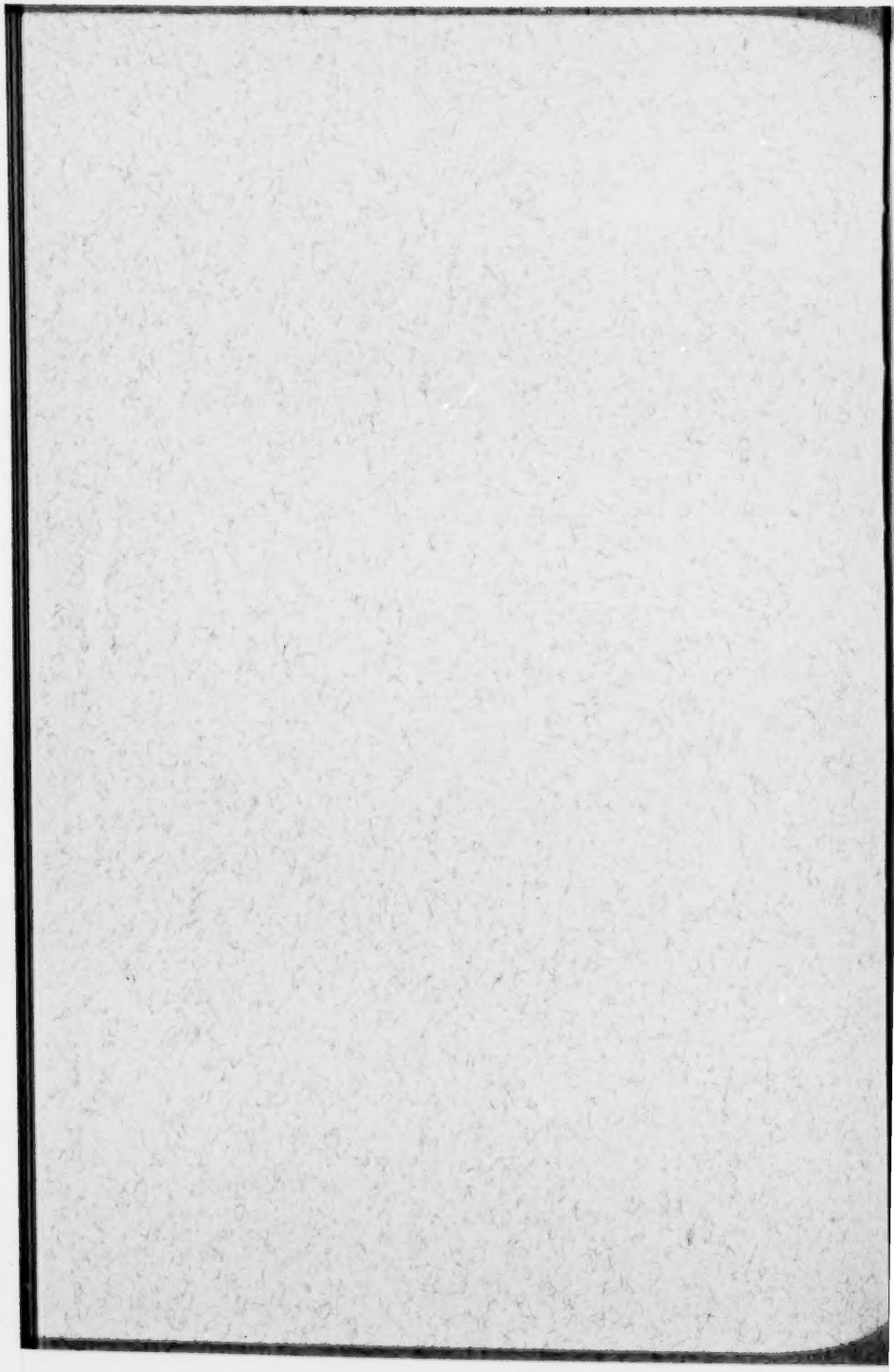
JAMES W. HOPKINS,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

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ELISE N. MILBURN, WIFE OF WILLIAM PALMER BILES,
Petitioner and Appellant Below,

versus

PROCTOR TRUST COMPANY, ET AL.,
Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Mrs. Elise N. Milburn, wife of William Palmer Biles, of the full age of majority and a resident of the Parish of St. Landry, Louisiana, respectfully shows:

I.

Summary Statement of the Matter Involved.

On March 31, 1939 petitioner filed in the State court this suit, a petitory action under the Louisiana law, against the Proctor Trust Company and the Sun Oil Company, wherein

she seeks to establish her ownership of an undivided one-fifteenth (1/15th) interest in lands in Avoyelles Parish, Louisiana, described as follows:

> SE¼ Section 19; W½ of SW¼ Section 20; S½ of Section 21; Lots 16, 17 and 18 of a survey of Gold Dust Plantation (being SE¼ of Section 20; E½ of SW¼ Section 20); SW¼; S½ of SE¼ Section 22; S½ of SW¼ Section 23, Township 2 South, Range 3 East.

These lands had belonged to petitioner's grandfather, the late William C. Milburn, who died intestate on February 29, 1932, or to the community which existed between him and his predeceased wife, Lise LeBlanc, who died intestate in 1899. Petitioner claims as an heir of her grandparents. Her father, James F. Milburn, died intestate on October 3, 1930, petitioner being one of five children. The heirship of petitioner is not in dispute. It is not now material to determine whether the lands were separate or community property.

Petitioner has asked to have declared a nullity the sheriff's deed to the Proctor Trust Company dated June 18, 1932 in the foreclosure of "Proctor Trust Company versus R. E. Milburn, et al." No. 8525 of the docket of the State District Court for Avoyelles Parish, and the administrator's deed to the Proctor Trust Company dated January 7, 1933 in the Succession of the late William C. Milburn, Probate No. 372 of the docket of the said State court, and further to have declared invalid an oil, gas and mineral lease dated March 5, 1934 by Proctor Trust Company to Sun Oil Company.

Petitioner's grandfather on July 1, 1925 had given a note for $8500.00 secured by mortgage on about half of the above described lands, being five hundred sixty (560) acres more or less. The Proctor Trust Company, holder of this note, instituted the foreclosure referred to above on March

16, 1932 after the death of the grandfather against his heirs including petitioner. The land subject to the mortgage was bought in at the sheriff's sale by the Proctor Trust Company. Thereafter, on August 28, 1932, the Proctor Trust Company claiming to be a creditor and acting through its representative, Guy Sherrill, purported to open the Succession of William C. Milburn. At a sale by Sherrill as administrator of the Succession on January 7, 1933, the Proctor Trust Company bought in the remaining lands, some five hundred sixty (560) acres.

The Proctor Trust Company and the Sun Oil Company removed the suit against them to the United States District Court for the Western District of Louisiana, Alexandria Division, and then filed answers.

After trial, the Federal District Judge denied petitioner's claim except as to SE¼; E½ of SW¼ Section 20 T. 2 S. R. 3 E., in which it was held that petitioner owned an interest inherited from the community half of her grandmother, as this property was purchased during the marriage of petitioner's grandparents.

On June 12, 1940, petitioner gave notice of appeal from this judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and the appeal was lodged in that court on August 19, 1940. After hearing on April 2, 1941, that court on September 9, 1941 handed down a decision affirming the judgment of the lower court. Although the Appellate Court had the case under advisement for five months, a very meager opinion was given, and there is practically no discussion of the legal points at issue. Petitioner timely applied for rehearing, which was refused on October 13, 1941.

The decision of the trial court is reported in 22 Fed. Supp. 635, and that of the Appellate Court in 122 F. (2d) 569.

Petitioner acquiesces in the decisions of the trial court and the Circuit Court of Appeals against her, except insofar as the administrator's deed to the Proctor Trust Company dated January 7, 1933 in the Succession of the late William C. Milburn has been held valid. This deed covers SE¼; E½ of SW¼ Section 20; S½ of SE¼; SW¼ Section 22; S½ of SW¼ Section 23 T. 2 S. R. 3 E. Petitioner maintains that this administrator's sale is an absolute nullity under the Louisiana law, and that it should be so held.

Petitioner has alleged as a ground (with others now waived) for the nullity of the administrator's sale, the following:

> "Although the said Proctor Trust Company, through its representative, Guy Sherrill, as appears fully from the record in the purported succession proceedings, provoked the administration of the succession and undertook to administer the same, the said Proctor Trust Company pretended to purchase the said property at the said sale held on January 7th, 1933, at an auction conducted by its own representative and agent, the said Sherrill, for and on behalf of the said Proctor Trust Company, and the said Sherrill acted both as auctioneer and as purchaser for the said Proctor Trust Company; and the said sale is and was an absolute nullity under Article 1146 of the Louisiana Civil Code and Revised Statutes Section 157 (Dart's Louisiana General Statutes, Section 500)."

The Proctor Trust Company alleged in answer to this ground as follows:

> "Defendant admits that it provoked the administration proceedings, that Guy Sherrill was duly appointed administrator and that he thereafter administered the lands as an officer of the Court.
>
> "Except as admitted the allegations of this sub-paragraph are denied. Further answering defendant shows that it purchased the lands of the succession at the ad-

ministrator's sale on January 7, 1933, through and by virtue of a bid of Five Hundred & No/100 ($500.00) Dollars, made by its attorney, Camden K. Staples. That said sale was and is a valid sale made under a proper order of Court, and said sale was confirmed by a judgment of the Court."

Its co-defendant, the Sun Oil Company, answered substantially the same.

The two defendants further pleaded prescription curing informalities in public sales under Article 3543 of the Louisiana Civil Code.

Article 1146 of the Louisiana Civil Code, on which petitioner relies, reads as follows:

"1146 (1139). PURCHASE OF SUCCESSION PROPERTY BY LEGAL REPRESENTATIVE PROHIBITED—EXCEPTIONS.—Every curator of vacant succession or of absent heirs is prohibited from purchasing by himself, or by means of a third person, any property, movable or immovable, entrusted to his administration, under the pain of nullity and responsibility for all damages caused thereby.

"Any executor, administrator, curator of vacant succession, or tutor, may purchase at the sale of the effects of the deceased, whose estate he may represent, when he is the surviving partner in the community or ordinary partnership, or an heir or legatee of the deceased or any mortgaged property when he is the mortgage creditor, or any property encumbered with a vendor's lien when he has a claim secured by such vendor's lien; and all purchases so made shall be considered as valid and binding as though made by any disinterested third party, and shall have full force against minors, interdicted persons, and married women. (As amended, Acts 1912, No. 197.)"

Section 157 of the Louisiana Revised Statutes, also relied upon, reads:

"It shall not be lawful for any person acting as auctioneer to purchase, either directly or indirectly, any

> property at a sale made by him, and any such sale shall be null and void."

An administrator of a Louisiana succession has the same powers and is subject to the same duties and responsibilities as a curator of a vacant estate insofar as the matters now under discussion are concerned. Article 1049 of the Louisiana Civil Code reads:

> "The administrators thus chosen have the same powers and are subject to the same duties and responsibilities as the curators of vacant estates, under the modifications hereafter made."

Article 3543 of the Louisiana Civil Code, pleaded by defendants as a basis for prescription, provides:

> "Any and all informalities of legal procedure connected with or growing out of any sale at public auction of real or personal property made by any sheriff of the parishes of this State, licensed auctioneer, or other persons, authorized by an order of the courts of this State, to sell at public auction, shall be prescribed against by those claiming under such sale after the lapse of two years from the time of making said sale, except where minors or interdicted persons were part owners at the time of making it, and in the event of such part ownership by said minors or interdicted persons, the prescription thereon shall accrue after five years from the date of public adjudication thereof."

The evidence offered at the trial by petitioner establishes that on August 28, 1932, the Proctor Trust Company filed a petition in the State District Court for the Parish of Avoyelles to open the Succession of William C. Milburn and have the succession administered. The Proctor Trust Company asked that Sherrill be named as administrator of the succession. The affidavit on the petition was executed by Sherrill who swore that "he is the duly authorized representative of the Proctor Trust Company." Sherrill was

named, qualified and acted as administrator of the succession. His only interest was for this Company.

In filing the petition, the Proctor Trust Company was represented by the same firm of attorneys which had filed the foreclosure for it against your petitioner and her coheirs. These attorneys after represented the administrator. A member of this firm of attorneys bought in the property for the Proctor Trust Company at the succession sale. This same attorney has represented it in the present action.

Sherrill testified that he had been connected with the Proctor Trust Company since 1930, and was still representing it at the time of the trial. He represented this Company in an endeavor to collect the mortgage note given by petitioner's grandfather. Sherrill admitted that he was the one who suggested to the Proctor Trust Company that it open the succession of Milburn and get the rest of the Milburn property which had not been mortgaged.

At the succession sale Sherrill, being administrator, acted as auctioneer.

It has been conclusively established that Sherrill, agent of the Proctor Trust Company, acted for it in opening and administering the succession. After the Proctor Trust Company bought in the remaining lands at the succession sale, these lands were handled for it by Sherrill. His compensation depended upon the acreage under his charge and the rentals collected therefrom.

II.

Jurisdictional Statement.

Petitioner believes that this Honorable Court has jurisdiction to review the judgment in question, and to issue the writ of certiorari sought under the Judicial Code, Sec-

tion 240 amended (28 U. S. C. A. 347). The cases cited below are believed to sustain the jurisdiction, viz:

Erie Railroad Company v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Cities Service Oil Company v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196.

III.

Questions Presented.

1) Is a sale by the administrator of a Louisiana succession to an ordinary creditor null and void where the succession is opened by this creditor, asking that its agent be named administrator, and this agent is appointed and acts as administrator, the auction of the succession property is by the administrator, and the succession property is bought in by this creditor through an attorney representing both the creditor and the administrator?

2) In the event that the administrator's sale is a nullity, is the nullity absolute, or is it cured by the prescription provided by Article 3543 of the Louisiana Civil Code?

IV.

Reasons Relied Upon for Allowance of the Writ.

A.

Under Article 1146 of the Louisiana Civil Code and Section 157 of the Louisiana Revised Statutes, and the decisions of the Louisiana courts interpreting the Article and the Section, the administrator's sale in the Milburn Succession is an absolute nullity. The United States District Court and the United States Circuit Court of Appeals for the Fifth Circuit should have applied and followed the State law and the decisions of the State courts interpreting the same.

Sherrill admittedly was the agent of the Proctor Trust Company, and acted for it in opening and handling the Milburn Succession. The principle that "he who acts through another acts for himself" is applicable. That is, the acts of Sherrill in administering the Milburn Succession were those of the Proctor Trust Company. In *Destrehan* v. *Louisiana Cypress Lumber Company, Ltd.,* 45 La. Ann. 920, 13 So. 230, the Louisiana Supreme Court said:

> "Whatever an agent does, within the scope of his authority, is, in legal effect, the act of his principal, who is entitled to its advantages, and is also subject to his liabilities."

Essentially, the Proctor Trust Company was, through Sherrill, the administrator of the Succession. Sherrill was its *alter ego.*

In *Dragon* v. *Ansardi,* 137 So. 586, the Orleans (Louisiana) Court of Appeal passed on a sale of succession property where the administrator purchased through an interposed party. That court held the sale an absolute nullity. It was said in part at page 588:

> "It is a rule of almost every system of jurisprudence that executors, administrators, and others acting in a fiduciary capacity cannot purchase the property of the estates they administer; they are mandataries; the same person cannot be both buyer and seller; nor will the law permit them to occupy a position in which the presumption is, that they would sacrifice the interests of others to the interests of themselves; trustees can never be purchasers; and what they cannot do directly themselves, they cannot do indirectly through the intervention of third persons; such sales are null; and the nullity is absolute and incurable. * * *"

In *Neda* v. *Fontenot,* 2 La. Ann. 782, the Administrator of the succession acted at the sale as the agent of the pur-

chaser. The sale was held to be an absolute nullity. The Louisiana Supreme Court said in part:

> "We have already shown that the terms of the sale were different from those fixed by the majority of the creditors; but we cannot close this part of the case without observing that another cause of nullity has been shown. It is in evidence that the administrator, being charged with the sale of the succession property, acted at that sale as agent of Marie Louise Fontenot, who purchased nearly the whole of it. This was clearly illegal. It is not proved, and we have no reason to believe, that he acted thus from improper motives; but —'when to prevent fraud, or from any other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, or not to be contrary to the public good.' Civil Code, art. 19."

In *Scott's Executrix* v. *Gorton's Executor,* 14 La. 115, it was held that the wife who was executrix could not sell to her husband who was in fact her agent. It was contended that the nullity was not absolute but relative. However, the court found otherwise and held that the sale was "an absolute nullity".

See, further, *Harrod* v. *Norris' Heirs,* 11 Mart. (O. S.) 297; *Aronstein,* v. *Irvine,* 49 La. Ann. 1478, 22 So. 405; Succession of Hawthorne, 158 La. 637, 104 So. 481.

Under the Louisiana decisions, a succession sale is invalid where the relationship of principal and agent exists between the purchaser and the succession representative.

In *Lane* v. *Cameron,* 36 La. Ann. 773, the Supreme Court of Louisiana had occasion to consider Section 157 of the Louisiana Revised Statutes prohibiting an auctioneer purchasing either directly or indirectly any property at a sale made by him. There the Sheriff was the auctioneer. It was claimed that the sale was void because the Sheriff was in-

terested in the purchase. However, the court found that it was not shown that the Sheriff did have an interest as all he had done was to sign the surety bond for the purchaser to guarantee the payment of the credit portion of the purchase price. The language of the Supreme Court is in point, viz:

> "That the sheriff himself, who made the sale, was one of the purchasers. If the fact alleged were sustained by the evidence in such manner as to show that the sheriff was, directly or indirectly, actually or contingently, a purchaser, we should not hesitate to strike the sale with nullity. This would result, not only from the express provision of Section 157 Revised Statutes, but, even independently thereof, from the common principles of honesty and morality."

Sherrill, the administrator, acting as auctioneer, sold the property of the Milburn Succession to his principal, the Proctor Trust Company, which purchased through the attorney representing both it and Sherrill. Such handling is violative of Section 157 and vitiates the sale.

B.

The Succession sale being made in violation of Article 1146 of the Louisiana Civil Code and Section 157 of the Louisiana Revised Statutes is absolutely null and void, and not relatively so. The Louisiana courts so held in decisions cited *supra.*

Article 3543 of the Louisiana Civil Code providing a prescription against informalities in connection with a public sale does not validate a null sale. Notably, the word "informalities" is used in the Codal Article.

In *Brewer* v. *Yazoo and M. V. R. Company,* 128 La. 544, 54 So. 987, the Supreme Court said:

> "The prescription of five years, against informalities, 'connected with, or growing out of,' public sales, is also pleaded by way of defense; but that prescription is in-

applicable to radical nullities, such as those which affected the sale made at the instance of Daniel Parish."

The State Supreme Court in *Lacroix* v. *Crane,* 133 La. 227, 62 So. 657, discussed a public sale where the property sold was adjudicated for less than one-tenth of its appraised value. This defect was held not to be a mere informality, but to make the sale null. The decision reads in part:

> "The next question is whether the defect in the adjudication is a nullity or an 'informality' curable by the prescription of five years as provided by article 3543 of the Civil Code.
>
> "In Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 South. 800, this court held that a probate sale, upon the first offering of the property of a succession for less than one-tenth of its value, according to the last appraisement, is a nullity and not a mere informality curable by the prescription of five years. According to the reasoning of the court in that case, the question of 'informality' vel non depends on the value of the property at the time and under the circumstances of the sale. The court held that if property be sold for less than two-thirds of the appraisement, and less than its value at the time, the defect is one of substance. In such a case there is not only illegality but substantial injury. We adhere to this ruling as correct in principle and as necessary for the protection of creditors * * *."

In 13 Tulane Law Review at page 615 in an article entitled "Prescription against defects in Judicial sales in Louisiana" it is said in part:

> "The prescriptions of Article 3543 are not intended to cure defects of a grievous nature. Thus the prescription can only run against informalities or relative nullities and not against absolute nullities. * * *"

See further, *Heroman* v. *Louisiana Institute of Deaf and Dumb,* 34 Ann. 805; *Dickey* v. *Pollock,* 183 So. 48.

V.

Petitioner presents to this Court and files herewith a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 9642, Elise N. Milburn, wife of William Palmer Biles, Appellant, *versus* Proctor Trust Company, et al., Appellees" to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and for such further relief as to this Court may seem proper.

New Orleans, Louisiana, November 14th, 1941.

ELISE N. MILBURN BILES,
Petitioner,

By JNO. W. HARRELL,
Of New Orleans,
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Of Counsel for Petitioner.